2006

Rebekah Munson v. Bruce H. Chamberlain, M.D., and Central Utah Medical Clinic : Brief of Appellee

Utah Court of Appeals

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ORIGINAL

IN THE UTAH COURT OF APPEALS

Rebekah Munson, Plaintiff and Appellant, vs. Bruce H. Chamberlain, M.D., and Central Utah Medical Clinic, Defendant and Appellee.	Court of Appeals No.: 20060447

BRIEF OF APPELLEES

APPEAL FROM THE RULINGS OF THE FOURTH DISTRICT COURT, UTAH COUNTY, HONORABLE LYNN W. DAVIS & HONORABLE DEREK P. PULLAN

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Date 9/26/06 UTAH SUPREME COURT/UTAH COURT OF APPEALS Case No. 20060447

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code section 78-2a-3(2)(j) (2006).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Because of the confusing procedural history of this case, stating the issues on appeal first requires some context. This case involves a medical malpractice claim brought by Rebekah Munson ("Ms. Munson") against Dr. Chamberlain and Central Utah Medical Clinic (collectively "Dr. Chamberlain"). Prior to the commencement of the lawsuit, Ms. Munson submitted her case for review by a prelitigation review panel as required by the Utah Healthcare Malpractice Act (the "Act").[1] Ms. Munson submitted to the panel both a Notice of Intent to Commence Action ("Notice of Intent") and an opinion letter prepared by her expert at the time, Dr. Kane ("Opinion Letter"). Under the Act, these documents thereafter were confidential, privileged, and immune from the civil process.[2] After the prelitigation hearing, Ms. Munson hired a new expert, Dr. Jacobs, to serve as her testifying expert at trial and provided him the Opinion Letter and the Notice of Intent. After discovering on the eve of trial that Dr. Jacobs had reviewed these confidential materials, Dr. Chamberlain moved to disqualify Dr. Jacobs from testifying at trial as a sanction for failing to keep the materials confidential. The trial court ruled that Ms. Munson had breached the confidentiality of the proceedings before the panel, but denied Dr. Chamberlain's motion and instead only declared a mistrial as a sanction.

As discussed below, it is unclear whether Ms. Munson is appealing from the order declaring a mistrial, the order denying her motion to reconsider the order declaring a

[1] Utah Code Ann. §§ 78-14-1, *et seq.*

mistrial (which is the only order listed on the Notice of Appeal), or the final order granting summary judgment to Dr. Chamberlain (the basis of which Ms. Munson does not seem to dispute). In light of the confusion, Dr. Chamberlain will address all three possibilities, but will assume that Ms. Munson has properly appealed from the order declaring a mistrial since that order is the focus of the opening brief. If this assumption is correct, then there are two separate issues for the Court to review.

Issue 1: Did the trial court err by ruling that Ms. Munson violated the statutory requirement to keep the proceedings before the prelitigation panel confidential when she provided to her testifying expert both the Notice of Intent and Opinion Letter, which were prepared for, presented to, and considered by the prelitigation panel?

Standard of Review: Interpretation of a statute presents a question of law reviewed for correctness. State v. Wallace, 2006 UT App 232, ¶10, 138 P.3d 599.

Issue 2: Did the trial court abuse its discretion by declaring a mistrial as a sanction for Ms. Munson having violated the statutory requirement to keep the proceedings before the panel confidential, where a mistrial preserved Ms. Munson's claims and afforded her the opportunity to obtain a new expert to assist in the prosecution of her case?

Standard of Review: A trial court's choice of sanction, including an order for mistrial, is reviewed for abuse of discretion. State v. Castle, 951 P.2d 1109, 1111 (Utah Ct. App. 1998) (quotations and citation omitted).

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[2] Utah Code Ann. § 78-14-12(1)(d).

DETERMINATIVE PROVISIONS

The determinative statutory provision of this appeal is Utah Code section 78-14-12(1)(d), which provides that "[p]roceedings conducted [by the prelitigation review panel] are confidential, privileged, and immune from civil process." Id. A copy of this section is attached as Addendum 1.

The determinative judicial interpretation of this section is found in Doe v. Maret, 1999 UT 74, 984 P.2d 980, which held that the confidentiality of the prelitigation proceedings encompasses any documents submitted to the review panel and that sanctions are appropriate for a breach of confidentiality. Id. at ¶21. A copy of this opinion is attached as Addendum 2.

STATEMENT OF THE CASE

Before Ms. Munson filed her complaint against Dr. Chamberlain, she first presented her medical malpractice claim to the prelitigation review panel, as required by the Act. (R. at 3, ¶ 6.) Ms. Munson prepared for, and presented to, the prelitigation panel a Notice of Intent to Commence Action ("Notice of Intent") and an opinion letter prepared by her expert at the time, Dr. Kane ("Opinion Letter"), both of which were considered by the panel. (R. at 262, ¶ 3.) Under Utah Code section 78-14-12(1)(d), the documents thereafter were confidential, privileged, and immune from the civil process.

After filing her complaint, Ms. Munson provided the two confidential documents to her testifying expert, Dr. Jacobs. (R. 556, Def's. Ex. 1.) Dr. Chamberlain did not discover that Dr. Jacobs had reviewed these documents until just before trial while preparing a cross-examination outline. (R. at 554, p. 5.) Dr. Chamberlain immediately

filed a motion to disqualify Dr. Jacobs from testifying at trial. (R. at 240.) Judge Lynn W. Davis, the trial court judge at the time, carefully considered the motion and ruled that Ms. Munson had violated the confidentiality of the prelitigation proceedings. (R. at 260.) Instead of granting Dr. Chamberlain's motion to disqualify and leaving Ms. Munson without an expert at trial, however, Judge Davis ordered a mistrial, thus preserving Ms. Munson's cause of action for another day. (R. at 259, ¶ 9; 260, ¶¶ 5, 7.)

After nearly two years of inactivity, Dr. Chamberlain filed a motion for summary judgment, arguing that Ms. Munson's claim required expert testimony and she had no expert to testify on her behalf at trial. (R. at 332.) In response, instead of simply retaining a new expert and proceeding to trial, Ms. Munson filed a motion to reconsider the order of mistrial. (R. at 370.) On April 24, 2006, Judge Pullan denied the motion to reconsider and granted Dr. Chamberlain's motion for summary judgment. (R. at 543-44.) On May 8, 2006, Ms. Munson filed a Notice of Appeal in which she states that she is seeking review only of Judge Pullan's ruling on her motion to reconsider. (R. at 551.)

STATEMENT OF THE FACTS

Ms. Munson claims that Dr. Chamberlain misdiagnosed her medical condition and erroneously prescribed steroids for treatment. (R. at 2, ¶17.) Before Ms. Munson could file a medical malpractice complaint, however, she was required to submit her case to a prelitigation review panel. As required by the Utah Healthcare Malpractice Act, Ms. Munson prepared a Notice of Intent to Commence Action ("Notice of Intent") and submitted it to the prelitigation panel. (R. at 3, ¶ 6.) Ms. Munson also submitted to the

panel an opinion letter drafted by her medical expert at the time, Dr. Kane (the "Opinion Letter"). (R. at 262, ¶ 3; 554, 8-9.)

On October 19, 2001, Ms. Munson filed her complaint against Dr. Chamberlain. (R. at 4.) To help prosecute her case, Ms. Munson hired a new expert, Dr. Jacobs, on the recommendation of Dr. Kane, to serve as her testifying expert at trial. (R. at 554, p. 9.) Ms. Munson provided Dr. Jacobs a number of documents, including both the Notice of Intent and the Opinion Letter, to assist Dr. Jacobs in forming his expert opinions in the case. (R. at 262 ¶ 3-5; R. at 556, Def's. Ex. 1.) A letter from Ms. Munson's attorney to Dr. Jacobs describes the Notice of Intent as a document that "outlines the facts and liability issues of the case." (R. at 556, Def's. Ex. 1, attached hereto as Addendum 5.)

In preparation for trial, Dr. Chamberlain's counsel discovered that Dr. Jacobs had been provided the Notice of Intent and Opinion Letter, which constituted a breach of the confidentiality of the prelitigation proceedings. (R. at 554, p. 5.) Because these materials were confidential, counsel for Dr. Chamberlain was not able to introduce these documents into evidence and question Dr. Jacobs about them. (R. at 554, p. 8.) The inability to cross-examine Dr. Jacobs about the confidential documents was significant because the documents demonstrate how Dr. Jacobs had simply adopted the earlier opinion of Dr. Kane and that Dr. Jacobs had done a superficial job of research while forming his opinions. (R. 554, pp. 7-9.) Without the ability to introduce the confidential documents, Dr. Chamberlain was unable to point out how Dr. Jacobs' opinion largely parroted Dr. Kane's earlier opinion. (See id.) Accordingly, Dr. Chamberlain moved to disqualify Dr. Jacobs from testifying at trial. (R. at 262, ¶ 2.)

On February 25, 2004, during the first day of the bench trial, Judge Davis heard oral argument on the motion to disqualify. (R. at 554.) Relying on Doe v. Maret, 1999 UT 74, 984 P.2d 980, Judge Davis ruled that Ms. Munson had breached the confidentiality of the prelitigation proceedings by providing to her testifying expert documents prepared for and considered by the prelitigation panel. (R. at 260-261.) Judge Davis found the breach to be "grave and serious" and ruled that it warranted sanctions. (Id.)

Judge Davis considered three possible sanctions: (i) simply grant Dr. Chamberlain's motion to disqualify and grant a directed verdict to Dr. Chamberlain, as Ms. Munson would then have no expert to testify on her behalf; (ii) allow Dr. Jacobs to testify and permit Dr. Chamberlain's counsel to cross-examine him about his reliance on the privileged prelitigation documents, thereby requiring Dr. Chamberlain's counsel also to breach confidentiality during cross-examination; and (iii) declare a mistrial to provide Ms. Munson the opportunity to retain another expert. (R. at 260.) Ultimately, the trial court found a mistrial to be the "most equitable sanction" because it preserved Ms. Munson's cause of action. (R. at 259, ¶ 9; see also R. at 554, p. 39.)

On June 30, 2005, sixteen months after Judge Davis had declared a mistrial, the trial court received notice that Ms. Munson had filed bankruptcy. (R. at 323-26; 407.) In her bankruptcy, Ms. Munson did not list her claims against Dr. Chamberlain as an asset with any value. (Id.) The Statement of Financial Affairs and Schedule B of Munson's bankruptcy filing specifically ask about pending lawsuits, but Ms. Munson did not mention her claim in either document, and it ultimately was not discharged. (R. at 407.)

On October 25, 2005, Dr. Chamberlain moved for summary judgment on the ground that Ms. Munson could not establish a *prima facie* case of medical malpractice without a testifying expert. (R. at 331-332.) Dr. Chamberlain argued that despite the fact Judge Davis had preserved Ms. Munson's cause of action almost two years earlier, Ms. Munson had failed to retain an expert to testify on her behalf. (See R. at 555, p. 45.) In response, Ms. Munson did not retain an expert, but instead filed a motion to reconsider the order of mistrial issued by Judge Davis. (R. at 370.) Ms. Munson argued that manifest injustice would result if the trial court did not vacate the order of mistrial. (R. at 362.)

On March 29, 2006, Judge Derek Pullan heard oral argument on both motions. (R. at 541.) Judge Pullan found no grounds to reconsider Judge Davis's earlier ruling or choice of sanction and therefore denied Ms. Munson's motion. (R. at 544-45.) When asked about Dr. Chamberlain's motion for summary judgment, counsel for Ms. Munson admitted that he had no expert witness and therefore could not establish a *prima facie* case of negligence against Dr. Chamberlain.[3] (Id.) The trial court then granted summary judgment in favor of Dr. Chamberlain. (Id.)

On May 8, 2006, Ms. Munson filed a Notice of Appeal. (R. at 551.) In the notice of appeal, Ms. Munson states that she is appealing from Judge Pullan's disposition of her motion to reconsider and does not mention the order granting Dr. Chamberlain's motion

[3] In Ms. Munson's memorandum in opposition to Dr. Chamberlain's motion for summary judgment, she explained that she lacked the financial resources to retain an expert but nonetheless was fully prepared to "pursue the matter through the appellate courts." (R. 398.)

for summary judgment or Judge Davis's order of mistrial. (Id.) In the docketing statement, however, Ms. Munson challenges the correctness of the order granting summary judgment, but only insofar as it relates to Judge Pullan's denial of Ms. Munson's motion to reconsider. (See Docketing Statement at 2.) Then, in the opening brief, Ms. Munson states that the two rulings at issue are Judge Pullan's order granting summary judgment and Judge Davis's original order of mistrial, neither of which are listed in the notice of appeal. (Aplt. Brief at 1.)

SUMMARY OF THE ARGUMENTS

As discussed in detail below, it is unclear from which order Ms. Munson is appealing. However, out of an abundance of caution, Dr. Chamberlain will assume that Ms. Munson has properly appealed from Judge Davis's order declaring a mistrial on February 25, 2004, even though the notice of appeal mentions only Judge Pullan's order denying Ms. Munson's motion for reconsideration on March 29, 2006.

The final judgment in this case stems from Judge Pullan's granting of Dr. Chamberlain's motion for summary judgment, in which he argued that Ms. Munson could not establish a *prima facie* case of medical malpractice without a testifying expert. At oral argument on the motion for summary judgment, counsel for Ms. Munson conceded both that expert testimony was required to prove Ms. Munson's medical malpractice claim and that Ms. Munson had no expert to testify on her behalf. Therefore, there is no dispute that Judge Pullan's grant of summary judgment was correct.

Ms. Munson instead argues that Judge Davis incorrectly ruled she had breached the confidentiality of the prelitigation proceedings, and therefore, erred by ordering a mistrial. Ms. Munson's argument comes down to an assertion that the rule followed by Judge Davis—and later Judge Pullan—will create chaos in medical malpractice cases. In particular, Munson argues that if the trial court's ruling is upheld, then expert witnesses could not view any information presented to the prelitigation review panel, including a claimant's medical records, without the disclosure leading to a mistrial. (Aplt. Brief at 8.) As Ms. Munson puts it, if medical records, for example, are reviewed by the prelitigation review panel, then "expert witnesses in medical malpractice cases are no longer authorized to view the alleged medical records relating to the alleged malpractice." (Id. at p. 28.)

The chaotic picture painted by Ms. Munson is based upon her failure to draw three key distinctions. The first distinction Ms. Munson fails to draw is between the trial court's ruling that she had breached confidentiality and the trial court's choice of sanction for that breach. This distinction is important because the trial court's decision to order a mistrial is reviewed under an abuse of discretion standard, whereas its ruling that Ms. Munson had violated the statutory mandate that the materials submitted to the prelitigation panel remain confidential is reviewed for correctness. Much of Ms. Munson's argument takes issue with the sanction imposed by Judge Davis, not the initial ruling concerning breach of confidentiality. Because trial courts enjoy great discretion in choosing an appropriate sanction, there is little chance that the chaotic picture painted by Ms. Munson will result.

The sanction imposed by Judge Davis illustrates the point. Not only was the choice of sanction—mistrial—not an abuse of discretion, it was the sanction that best served Ms. Munson's interests. The trial court could have precluded Ms. Munson's expert from testifying and then granted a directed verdict in favor of Dr. Chamberlain because she did not have an expert for trial. Instead, Judge Davis chose the least restrictive sanction that protected the rights of all parties while respecting the confidentiality of documents submitted to the prelitigation panel. As Judge Davis explained in his order, "the Court would like to impose a sanction that would preserve Plaintiff's case." (R. 260.) Far from an abuse of discretion, the choice of sanction was the most equitable choice under the circumstances.

The other two distinctions Ms. Munson fails to draw similarly support Judge Davis's ruling that Ms. Munson breached the confidentiality of the prelitigation proceedings. The second distinction Ms. Munson fails to draw is between the underlying facts of her case and documents specifically prepared for, presented to, and considered by the prelitigation panel. No confidentiality attaches to the underlying facts; otherwise, no case could ever proceed beyond the prelitigation proceedings. The documents prepared for the prelitigation panel, however, are, by statute, absolutely "confidential, privileged, and immune from civil process." Utah Code Ann. § 78-14-12(1)(d).

The only burden this places on plaintiffs is the same burden that existed before prelitigation panels were created: Plaintiffs must prove their claims using evidence that would have existed if there were no prelitigation process. The underlying facts can be considered by any retained expert; experts simply cannot review the documents prepared

for and submitted to the panel, especially if they are testifying experts. Therefore, to use Ms. Munson's example, there is no statutory prohibition on disclosing a plaintiff's medical records because these documents were not prepared for the prelitigation panel, but there is a prohibition on disclosing the Notice of Intent and Opinion Letter, both of which were specifically prepared for the prelitigation panel. The Legislature's choice to treat materials presented to the prelitigation panel as "confidential, privileged, and immune from civil process" is a sensible one. It has not and will not lead to chaos.

The third distinction Ms. Munson fails to draw is between a testifying expert witness and a consulting expert. If Ms. Munson had revealed the confidential documents to a consulting expert, the confidentiality of the documents likely would have been preserved. Ms. Munson, however, revealed the Notice of Intent and Opinion Letter to Dr. Jacobs, her testifying expert witness. In so doing, Ms. Munson exposed those confidential documents to the disclosure requirements of Rule 26 of the Utah Rules of Civil Procedure and to disclosure during cross-examination of Dr. Jacobs. Therefore, the rule followed by the trial court does not entail that parties can never share confidential documents with experts, as Ms. Munson suggests, but instead merely requires attorneys to follow what is already common practice: Attorneys cannot disclose confidential or privileged documents to their own testifying expert witnesses without risking waiver or sanction. Again, the rule makes perfect sense.

The rule followed by Judge Davis is a sensible rule that will not lead to chaos as Ms. Munson suggests. Assuming Ms. Munson has properly appealed Judge Davis's order declaring a mistrial, the Court should affirm the trial court's (i) ruling that Ms.

Munson breached confidentiality by providing confidential documents to her testifying expert and (ii) choice of sanction, which was the only solution that preserved the rights of Ms. Munson and respected the statutorily imposed confidentiality of the prelitigation proceedings.

ARGUMENT

As an initial matter, the basis of Ms. Munson's appeal requires clarification, as it is unclear from which order Ms. Munson is appealing, which issues have been presented to the Court, and what standard of review is applicable. In the Notice of Appeal, Ms. Munson states that she is appealing only from the disposition of her "Motion to Reconsider the Order of Mistrial entered by the above-entitled Court on April 24, 2006." (Notice of Appeal, attached as Addendum 3.) A trial court's decision not to reconsider a prior ruling, however, cannot constitute a final judgment or order that "disposes of the claims of the parties." Loffredo v. Holt, 2001 UT 97, ¶12, 37 P. 3d 1070. Any order denying a motion to reconsider merely maintains the *status quo*, and thus, cannot itself constitute a final order. Insofar Ms. Munson has appealed only from the order denying her motion to reconsider, then this Court lacks jurisdiction and should dismiss Ms. Munson's appeal. See id.; Utah R. App. P. 3(a).

Ms. Munson's Docketing Statement then lists the following issue, which was not encompassed by the notice of appeal: "Whether the trial court erred in then granting Defendants' request for summary judgment." (Docketing Statement at 2.) While the order granting summary judgment in favor of Dr. Chamberlain did "dispose of the claims

of the parties" and therefore an appeal from it would provide the Court jurisdiction, Ms. Munson does not take issue with the grounds of Dr. Chamberlain's motion for summary judgment.[4] Ms. Munson disputes neither that she needed expert testimony to establish a *prima facie* case for medical malpractice nor that she had no expert for trial. Instead, Ms. Munson appears to take issue with the order granting summary judgment only insofar as it depends upon the trial court's simultaneous denial of her motion to reconsider, which, in essence, is no different than appealing from the denial of the motion to reconsider itself.

This is significant, because, assuming the Court has jurisdiction to entertain Ms. Munson's appeal, if Ms. Munson is appealing only the trial court's denial of her motion to reconsider (via an appeal from the order granting summary judgment), then the standard of review for every issue she raises is abuse of discretion. Issues that would normally be reviewed for correctness are reviewed for abuse of discretion when embedded in a motion to reconsider. Timm v. Dewsnup, 921 P.2d 1381, 1386 (Utah 1996) ("A trial court's decision to grant or deny a motion to reconsider summary judgment is within the discretion of the trial court, and we will not disturb its ruling absent an abuse of discretion.") Here, the trial court did not abuse its discretion by denying Ms. Munson's motion to reconsider. Ms. Munson failed to demonstrate that there had been a change in the governing law, there was new evidence, or that manifest injustice would result if the court failed to reconsider its prior ruling. See Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1310-11 (Utah Ct. App. 1994). Therefore, insofar

[4] A copy of Judge Pullan's order granting summary judgment is attached as Addendum 4.

as Ms. Munson has properly appealed the denial of her motion to reconsider, the Court should affirm the trial court's ruling as a proper use of its discretion.

Ms. Munson's opening brief provides yet another picture of the issues before the Court. What is clear in the opening brief is that Ms. Munson's primary contention now is that Judge Davis erred by ordering a mistrial. (Aplt. Brief at 1.) What is unclear is which aspects of Judge Davis's order Ms. Munson is challenging in her opening brief. When setting forth the Issue Presented, Ms. Munson presents only one issue for the Court to review.[5] In the Argument section, however, Ms. Munson presents two distinct issues, each carrying a different standard of review.

Consistent with the Issue Presented, Ms. Munson first argues that the trial court erred as a matter of law when it ruled she had violated the confidentiality of the prelitigation proceedings. (Id. at 12-20.) Ms. Munson then argues, however, that the trial court also erred by failing to implement remedies other than ordering a mistrial, such as permitting only "a limited examination of Dr. Jacobs in camera," or "clear[ing] the courtroom" during Dr. Jacob's testimony, or allowing "that portion of the cross-examination under seal," or ordering counsel for Dr. Chamberlain to cross-examine "Dr. Jacobs regarding the documenting in question without ever discussing the prelitigation panel at all." (Aplt. Brief at 22-24.) Ms. Munson concludes that because these alternative remedies were available, the trial court erred by excluding Dr. Jacobs as a

[5] The sole issue presented by Ms. Munson is as follows: "Whether a retained expert witness in a medical malpractice action should be absolutely prohibited under Utah Code Annotated § 78-14-12 (2005) from viewing the documents, reports, or medical records relating to the malpractice case, simply because those documents were also submitted to the prelitigation panel for its own review." (Aplt. Brief at 1.)

witness and declaring a mistrial. (See id. at 24.) These arguments challenge the sanction selected by Judge Davis, not the legal issue of whether disclosure of the prelitigation documents to Dr. Jacobs breached confidentiality. While it is understandable that Ms. Munson would prefer the Court to construe all of the issues she presents as pure questions of law, a trial court's decision to declare a mistrial as a sanction, instead of some other sanction, is reviewed for abuse of discretion. State v. Castle, 951 P.2d 1109, 1111 (Utah Ct. App. 1998).

In light of the confusing procedural history and contradictory statements in the papers filed by Ms. Munson, out of an abundance of caution, Dr. Chamberlain will assume that the following two issues raised in the Argument section of the opening brief are properly before the Court: (i) Did the trial court err by ruling that Ms. Munson violated the statutory requirement to keep the proceedings before the prelitigation panel confidential when she provided to Dr. Jacobs both the Notice of Intent and Opinion Letter, and (ii) Did the trial court abuse its discretion by declaring a mistrial as a sanction for Ms. Munson having provided the two documents to Dr. Jacobs.

I. MS. MUNSON DOES NOT DISPUTE THE GROUNDS FOR THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF DR. CHAMBERLAIN.

The final judgment in this case—from which Ms. Munson does not appeal in the Notice of Appeal—stems from Judge Pullan's granting of summary judgment to Dr. Chamberlain over two years after the ruling by Judge Davis that Ms. Munson takes issue with in her opening brief. Judge Davis ruled that Ms. Munson had breached the confidentiality of the prelitigation proceedings on February 25, 2004, and as a result he

declared a mistrial. Ms. Munson did not seek appellate review of this ruling or ask Judge Davis to reconsider it. Instead, she waited nearly two years before asking for reconsideration of Judge Davis's ruling, and only then in response to Dr. Chamberlain's motion for summary judgment filed on October 25, 2005, and after having represented to the bankruptcy court that her claim against Dr. Chamberlain had no value.

In Dr. Chamberlain's motion for summary judgment, he argued that Ms. Munson could not establish a *prima facie* case of medical malpractice without a testifying expert. Dr. Chamberlain argued that despite the fact Judge Davis had preserved Ms. Munson's cause of action almost two years earlier, Ms. Munson had failed to retain an expert to testify on her behalf. At oral argument on the motion for summary judgment, counsel for Ms. Munson conceded both that expert testimony was required to prove Ms. Munson's medical malpractice claim and that Ms. Munson had no expert to testify on her behalf. (R. at 544-45.) Therefore, there is no question—and it appears no dispute on appeal—that Judge Pullan's grant of summary judgment was correct.

Instead, the only question raised by Ms. Munson in her opening brief is whether Judge Davis's original ruling on February 25, 2004, was correct. It is to this issue that Dr. Chamberlain now turns.

II. THE TRIAL COURT CORRECTLY RULED THAT MS. MUNSON BREACHED THE CONFIDENTIALITY OF THE PRELITIGATION PROCEEDINGS BY DISCLOSING CONFIDENTIAL DOCUMENTS TO A TESTIFYING EXPERT.

Under the Utah Healthcare Malpractice Act (the "Act"), prior to commencing a medical liability claim a plaintiff must first serve a notice of intent to commence action

against the health care provider and file a request for review of the potential claim by a prelitigation review panel. See Utah Code Ann. §§ 78-14-8, -12. The prelitigation panel will then issue a decision concerning "whether each claim against each health care provider has merit or has no merit and, if meritorious, whether the conduct complained of resulted in harm to the claimant." Id. at § 78-14-14. The plaintiff is then free to file a complaint in district court alleging the medical liability claim.

The stated purpose of the Act is to provide "procedural changes to expedite early evaluation and settlement of claims." Id. at § 78-14-2. Consistent with this stated purpose, the proceedings before the prelitigation panel are confidential, much like settlement negotiations are confidential and therefore inadmissible under Rule 408 of the Utah Rules of Evidence. Utah R. Evid. 408 ("Evidence of conduct or statements made in compromise negotiations is . . . not admissible."). Like Rule 408, "[e]vidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determination are not admissible as evidence in an action subsequently brought by the clamant in a court of competent jurisdiction." Utah Code Ann. § 78-14-15(1).

However, unlike Rule 408, the Act does not stop there to ensure frank and open discussion before the panel. It also provides, in a separate section, that the proceedings "are confidential, privileged, and immune from civil process." Id. at § 78-14-12(1)(d). Interpreting this section, and consistent with the purpose of the Act, the Utah Supreme Court has held that any document "utilized as part of the prelitigation review . . . is part of the proceeding and must be kept confidential." Doe v. Maret, 1999 UT 74, ¶21, 984 P.2d 980. Failure to keep such documents confidential may "result in sanctions." Id.

Ms. Munson does not dispute that (i) the plain language of the Act classifies evidence submitted to the prelitigation panel as confidential, (ii) the legislative intent was to keep the documents presented to the panel confidential, (iii) the legislative purpose is served by keeping the documents presented to the panel confidential, or (iv) the Utah Supreme Court has held that the documents must remain confidential and failure to do so will result in sanctions. Instead, Ms. Munson asks the Court to overturn the holding of the Utah Supreme Court in Maret, (Aplt. Brief at 32-34), refuse to enforce the statue because it produces "absurd results," (see id. at 26-32), and, in any event, carve out an exception for testifying experts, even though the statute plainly states that evidence before the prelitigation panel is inadmissible, confidential, privileged, and immune from civil process. (See id. at 8-21.) As demonstrated below, there is no reason for the Court to adopt any of these drastic measures. Keeping documents prepared for and considered by the prelitigation panel confidential furthers the important legislative purpose of the Act and prejudices no one.

A. This Court Lacks the Authority to Overturn the Utah Supreme Court Decision in Maret, and There is No Reason to Do So Even if the Court Did Have the Authority.

The first route suggested by Ms. Munson can be dispensed with in short order. This Court lacks the authority to overturn Maret, even if the Utah Supreme Court had misinterpreted the statute, which it did not. See State v. Menzies, 889 P.2d 393, 399 n.3 (Utah 1994) (explaining this Court's duty to adhere strictly to Utah Supreme Court precedent, pursuant to the doctrine of stare decisis); State v. Reyes, 2004 UT App 8, ¶21, 84 P.3d 841 ("Only the Utah Supreme Court can correct any deficiencies in [its

precedent].").

In any event, the Utah Supreme Court's interpretation of the statute in Maret is entirely sensible. Under Utah law, the primary goal of appellate courts "in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." Foutz v. City of S. Jordan, 2004 UT 75, ¶11, 100 P.3d 1171 (quotations and citation omitted). In addition, courts "presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." C.T. v. Johnson, 1999 UT 35, ¶9, 977 P.2d 479 (quotations and citation omitted). Further, courts "read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." Miller v. Weaver, 2003 UT 12, ¶17, 66 P.3d 592.

Here, the plain language, legislative intent, legislative purpose, and surrounding provisions all suggest that section 78-14-12(1)(d) should be interpreted to prohibit the disclosure and future use of any documents prepared for and submitted to the prelitigation panel. As the Supreme Court put it in Maret, any document "utilized as part of the prelitigation review . . . is part of the proceeding and must be kept confidential." 1999 UT 74 at ¶21. And there is no question that Maret reflects the intent of the Legislature. As Ms. Munson points out in her opening brief, the Legislature amended section 78-14-12 in 2002, but did not alter the language in section 78-14-12(1)(d) interpreted in Maret. (Aplt. Brief at 10.) If Maret created the chaos suggested by Ms. Munson, one would have expected the Legislature to have stepped in, or at least for another case questioning Maret to have made its way to an appellate court. The fact is,

litigants have had no problems complying with Maret, which announces a straightforward and sensible interpretation of section 78-14-12(1)(d). Even if this Court had the authority to overturn a holding of the Utah Supreme Court, it should not do so in this case.

Under the Utah Supreme Court's interpretation in Maret, there is no question that Ms. Munson breached the confidentiality of the prelitigation proceedings. Both the Notice of Intent and Opinion Letter were prepared for and utilized by the prelitigation panel. Under the express holding of Maret, a notice of intent is privileged and confidential under the statute. 1999 UT 74 at ¶21. The Opinion Letter is no different. Ms. Munson's expert at the time of the prelitigation hearing, Dr. Kane, drafted the Opinion Letter for use in the prelitigation proceedings. (R. at 555, p. 5.) And like the Letter of Intent, the Opinion Letter was submitted to the panel, and the panel utilized it in its review. (R. at 262, ¶ 3.) The Opinion Letter also qualifies as a part of the prelitigation proceedings and is therefore confidential, privileged, and immune from the civil process. Ms. Munson does not dispute that she provided both of these documents to her testifying expert, Dr. Jacobs, who would have to testify in open court and be subject to cross-examination concerning the documents he reviewed and the bases of his opinions. Therefore, by providing these documents to Dr. Jacobs, Ms. Munson breached the confidentiality of the prelitigation proceedings, as provided by the Legislature in section 78-14-12(1)(d).

B. Interpreting Section 78-14-12 to Prohibit Ms. Munson from Revealing Prelitigation Documents to Her Testifying Expert Does Not Lead To "Absurd Results."

Instead of arguing that Judge Davis misread the statute, or that his interpretation

conflicts with the Legislature's intent or purpose, or that his interpretation fails to follow precedent, Ms. Munson appeals to the rarely used canon of statutory construction that courts should "construe statutes to ensure that there will be no absurd results." (Aplt. Brief at 26.) However, as long as there is a reasonable interpretation of the statute, it "is axiomatic that [the] statute should be given a reasonable and sensible construction." Board of Educ. v. Sandy City Corp., 2004 UT 37, ¶9, 94 P.3d 234 (quotations and citation omitted). Here, the only way to make the statute appear absurd is by failing to draw two reasonable distinctions: (i) between documents prepared for the prelitigation panel and the underlying facts of the case and (ii) between a breach of confidentiality and the array of possible sanctions that could be imposed by a trial court for that breach. Once these distinctions are attended to, Judge Davis's interpretation of section 78-14-12(1)(d), far from being absurd, is the only reasonable interpretation.

1. Section 78-14-12(1)(d) Prevents Disclosure of Documents Prepared For, Presented To, and Considered By the Prelitigation Panel; It Does Not Prevent Disclosure of the Underlying Facts of the Case.

Ms. Munson argues that the Court should not interpret section 78-14-12(1)(d) according to its plain language because to do so will lead to absurd results. Specifically, Ms. Munson argues that, under Judge Davis's interpretation of the statute, if medical records were submitted to the prelitigation panel, then they could not thereafter be shared with expert witnesses. (Aplt. Brief at 27-28.) This argument fails to recognize the distinction between documents specifically prepared for the prelitigation panel and the underlying facts of the case. While section 78-14-12(1)(d) plainly forbids disclosure of documents specifically prepared for and presented to the panel, it does not render every

bit of information contained in those documents confidential and inadmissible at trial. As long as the information can be obtained independent of the prelitigation proceedings, then it is not confidential under the statute. This distinction is fundamental, and it undermines Ms. Munson's attempt to construe the statute as absurd.

Like the attorney-client privilege, the confidentiality provision of section 78-14-12(1)(d) protects confidential communications, not the underlying facts that inform those communications. The purpose of the attorney-client privilege is to promote communication and the free exchange of information between the lawyer and the client. Gold Standard, Inc. v. American Barrick Res. Corp., 801 P.2d 909, 911 (Utah 1990) (stating that the privilege is "intended to encourage candor between attorney and client and promote the best possible representation of the client"). The Legislature's purpose in enacting the Act was to provide procedures, such as the prelitigation review panel, to expedite early evaluation and settlement of claims. Utah Code Ann. § 78-14-2. Confidentiality in these proceedings functions like the attorney-client privilege in that it promotes frank discussion and full disclosure. This enables the prelitigation panel to fulfill its purpose of evaluating claims and facilitating settlement. However, just as one cannot render facts inadmissible merely by uttering them to one's attorney, one cannot render facts—such as those reflected in medical records—confidential merely by presenting them to the prelitigation panel. This distinction is fundamental and embedded in the law of privilege. See Jackson v. Kennecott Copper Corp., 27 Utah 2d 310, 315, 495 P.2d 1254, 1257 (Utah 1972) (stating that a person "cannot foreclose the discovery

process by the simple expedient of funneling [information] into its counsel's custody"). There is no reason to interpret section 78-14-12(1)(d) any differently.

The distinction is also embedded in Rule 408 of the Utah Rules of Evidence, which provides that "[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." Utah R. Evid. 408. While one cannot render factual evidence inadmissible by reciting it during settlement negotiations, documents prepared for and exchanged during settlement negotiations are nonetheless inadmissible even if they contain some information that is otherwise discoverable. This distinction is sensible, and there is no reason to read section 78-12-14(1)(d) any differently, especially in light of its similar purpose "to expedite early evaluation and settlement of claims." Utah Code Ann. § 78-14-2.

A clear distinction exists between the facts of this case—as represented in, for example, medical records—and the confidential documents at issue in this appeal. Although the content of the Opinion Letter cannot be discussed here, in general, an opinion letter does not merely recite facts, but instead interprets and analyzes facts—such as those contained in medical records—and arrives at a conclusion as to what the facts mean. Also, unlike medical records, the Notice of Intent and Opinion Letter were created specifically for the prelitigation panel. The Notice of Intent and especially the Opinion Letter frame, analyze, and opine as to the nature of the facts and the strength of a claimant's case. There is no reason to interpret section 78-14-12(1)(d) to render medical records confidential and therefore inadmissible simply because they are submitted to the prelitigation panel.

2. Any Harsh Result Stemming From Section 78-14-12(1)(d) Can Be Mitigated by the Trial Court's Choice of Sanction.

In this case, Judge Davis ruled that Ms. Munson had breached confidentiality not because Ms. Munson had revealed the facts of the case to Dr. Jacobs, but because Ms. Munson had provided the Notice of Intent and Opinion Letter to Dr. Jacobs. Judge Davis's ruling did not lead to chaos in this case, and it will not in the future if followed by other courts. Any harshness of the rule—of which there is none here—could easily be mitigated by the trial court in choosing the appropriate sanction. This case illustrates the point. Judge Davis did not disqualify Dr. Jacobs from testifying and dismiss Ms. Munson's case because she had no expert. Instead, Judge Davis ordered a mistrial, giving Ms. Munson time to hire a new expert, with whom she could have shared the facts which allegedly support her claim. The only restriction imposed by the trial court's decision was that the new expert could not review and rely on confidential prelitigation documents such as the Notice of Intent and Opinion Letter, because if he did, Dr. Chamberlain's counsel could not cross-examine him about them.

Ms. Munson is simply mistaken that the trial court's decision prevented her lawyers from adequately trying her case. The trial court's decision merely recognized the statutory duty on lawyers under section 78-14-12(1)(d) to keep confidential information confidential, a duty all lawyers should readily recognize. See Utah R. of Prof. Conduct 1.6. Once the distinction between documents prepared for and submitted to the

prelitigation panel and the underlying facts of the case is recognized, the chaotic picture Ms. Munson paints fades away.

C. The Court Should Not Create an Exception to Section 78-14-12(1)(d) for Testifying Experts Because They Testify in Open Court Subject to Cross-Examination.

Ms. Munson also overstates the effect of section 78-14-12(1)(d) by failing to distinguish between testifying and non-testifying experts. Unlike with a non-testifying expert, when confidential documents are provided to a testifying expert, the documents are thereby exposed to the disclosure requirements of Rule 26 of the Utah Rules of Civil Procedure and possible disclosure during cross examination of the expert witness. Utah R. Civ. P. 26; Utah R. Evid. 705. Testifying experts must provide a written report that discloses the "substance of the facts and opinions to which the expert is expected to testify; [and] a summary of the grounds for each opinion."[6] Utah R. Civ. P. 26(a)(3)(B); (R. at 555, p. 14.) Thus, Dr. Jacobs had a duty to disclose the fact that he had received the Notice of Intent and Opinion Letter. This is not a duty that would have been imposed on expert consultants. Utah R. Civ. P. 26(b)(4).

Furthermore, the Utah Rules of Evidence allow for cross-examination of "the underlying facts or data" relied on by the expert even if the expert had not previously disclosed those facts or data. Utah R. Evid. 705; State v. Clayton, 646 P.2d 723 (Utah 1982). In Clayton, the Utah Supreme Court held that once an expert renders an opinion the opposing party may challenge the "'suitability or reliability of the witness' foundation

[6] The trial court recognized this distinction and stated that if the opinion of the consulting expert is disclosed to the testifying expert, Rule 26 would require disclosure of this fact. (R. at 555, p. 14.)

materials on cross-examination." 646 P.2d at 726. Therefore, by providing privileged information to Dr. Jacobs, who was retained to testify at trial and therefore was subject to cross-examination in open court, Ms. Munson breached the confidentiality requirement under the statute.

There is no reason for the Court to carve out an exception to the statute to avoid this result. The facts of this case illustrate why. If Dr. Jacobs had been allowed to testify, Dr. Chamberlain's counsel would have faced a choice between two unacceptable courses of action. Dr. Chamberlain's counsel could have chosen to fulfill his professional duty to represent his client zealously and cross-examined Dr. Jacobs as to his reliance on the confidential documents. However, this choice exposed counsel for Dr. Chamberlain to possible sanctions, as counsel would have had to introduce the confidential documents into evidence to question the expert about them.[7]

Dr. Chamberlain's counsel also could have chosen to respect the confidentiality of the prelitigation proceedings. In so doing, however, Dr. Chamberlain's counsel would have been forced to forego what, Dr. Chamberlain submits, would have been an effective and revealing probe of Dr. Jacobs' credibility and the bases of his opinions.[8] As Dr. Chamberlain's counsel pointed out to Judge Davis, "[t]here are omissions, there are

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[7] It is not clear that this option is even available: "Evidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the clamant in a court of competent jurisdiction." Utah Code Ann. §§ 78-14-15(1) (emphasis added).

[8] Indeed, Dr. Chamberlain's counsel has an ethical duty to inquire into the basis of the expert's testimony because of its importance to the case. One of the most fundamental obligations a lawyer has is the obligation to act as a loyal advocate for his or her client. Restatement 3d of Law Governing Lawyers, at § 16. As an advocate, a lawyer is charged

inaccuracies, and it speaks to a relationship between [Dr. Kane and Dr. Jacobs] that I think demonstrates bias and is certainly a fertile field for cross examination for me that I am precluded from approaching because of confidentiality." (R. at 554, p. 8). In this case, the Opinion Letter in particular demonstrates how Dr. Jacobs had simply adopted the earlier opinion of Dr. Kane as well as showing that Dr. Jacobs had done a superficial job of research while forming his opinions. Without the ability to introduce the confidential documents, Dr. Chamberlain was unable to point out how Dr. Jacob's opinion largely parrots Dr. Kane's opinion.[9]

For all these reasons, interpreting section 78-14-12(1)(d) to prevent disclosure of prelitigation materials to testifying experts makes perfect sense, but the same rule does not necessarily apply to non-testifying experts, the type of expert discussed in most of the cases cited by Ms. Munson in her brief.[10] In addition, carving out an exception for testifying experts would undermine the purpose of the Act. If potential litigants must guard against the possibility that evidence presented to the prelitigation panel will be

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with "zealously assert[ing] the client's position under the rules of the adversary system." Preamble to Utah R. of Prof. Conduct at [2].

[9] Dr. Chamberlain's counsel had already indicated that he would decline to delve into the confidential documents on cross examination. (R. at 555, p. 33).

[10] Munson also relies upon In re Anonymous, 283 F.3d 627 (4th Cir. 2002), as support for her argument that "courts have long recognized that these expert witnesses must be able to view, analyze, and testify regarding confidential information." (Aplt. Brief at 14.) She then quotes the court as saying that "an attorney is permitted to consult with . . . experts or professionals retained by the law firm to aid in the negotiation or structuring of the settlement." (Id. at 15) The case and the quotation does not support her contention. The court's quoted statement applies not to in-court testimony, but only to experts who aid in settlement negotiations, an activity protected by Rule 408 fo the Utah Rules of Evidence. Thus, in In Re Anonymous, in which the court found a breach of confidentiality, also does not advance Munson's argument that testifying experts can review docuements designated as confidential by the Legislature without breaching confidentiality.

presented at trial, they will be far less likely to act with the candor necessary for the prelitigation proceedings to be effective. As the trial court recognized here, to carve out exceptions to the confidentiality requirement would create a "confused and unpredictable juris prudence [sic] that would undermine the purposes" of the requirement, in particular, the purpose of expediting "early settlement in an environment in which parties can speak candidly without fear of subsequent disclosure of the proceedings, and critical documents produced therein." (R. at 555, p. 44). Judge Davis's decision respects the importance of maintaining the confidentiality of the prelitigation proceedings, and far from leading to absurd results, furthers the express purpose of the Legislature.

Ms. Munson responds to Judge Davis's decision by asserting that either she or Judge Davis could have waived the privilege as to the confidential documents. (Aplt. Brief at 20). This argument is unpersuasive for a number of reasons. First, there is no contemplation of waiver in the Act, presumably because no one can "waive" the privilege but the Legislature. Typically, a privilege may be waived by the entity whose interest it is meant to protect. For example, the client may waive the attorney-client privilege. Utah R. Evid. 504. Here, however, the confidentiality of the prelitigation proceedings protects more than just the parties to the controversy. The confidentiality rule protects the interest of the state in providing confidential prelitigation proceedings and the interests of the panel in having its decisions free from public disclosure and criticism. Allowing a litigant to waive this confidentiality because it serves his or her litigation purposes ignores the other interests protected by the confidentiality requirement.

Second, a plain reading of the statue reinforces the conclusion that the confidentiality simply can not be waived. The statute states that the prelitigation proceedings are privileged and confidential and immune from civil process. Utah Code 78-14-12(1)(d). When reviewing a statute it is assumed that "each term in a statute was used advisedly." Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1020 (Utah 1995) (quotations and citation omitted). The prelitigation proceedings are not merely privileged. To hold that a litigant or court may waive the privilege attached to the prelitigation proceedings renders the words "confidential" and "immune from civil process" meaningless. State v. Haltom, 2005 UT App 348, ¶19, 121 P.3d 42 (A statute should be read to "avoid interpretations that will render portions of a statute superfluous or inoperative." (quotations and citation omitted)). A party cannot waive the confidential classification of either the prelitigation proceedings or materials like the Opinion Letter and Notice of Intent.

Furthermore, until the Legislature creates an exception to the confidentiality rule, the Court should not read one into it. In Frederick, the Supreme Court refused to read a waiver into a rule of confidentiality created for marriage and family therapists. 890 P.2d 1017. The statute established a privilege and enumerated four situations that subjected the privilege to waiver. Id. at 1021. The court refused to interpret the statute to include an additional waiver not expressly provided for in the language of the statute. See id. The court stated that even if the statute's result was "infirm, amendments to correct the inequities should be made by the legislature and not by judicial interpretation." Id. (quoting Masich v. U.S. Smelting Ref. & Mining Co., 191 P.2d 612, 625 (Utah 1948)).

Here, section 78-14-12 does not provide for any exceptions to the confidentiality requirement and there is no reason for the Court to read one into it.

This conclusion is reinforced by the fact that the Legislature has created numerous confidentiality rules, and in some of the rules it has chosen expressly to list situations where a waiver is possible, while not doing so in others. See e.g., Utah Code Ann. § 30-1-37 (1971) (information provided by marriage license applicant is strictly confidential); Utah Code Ann. § 30-3-17.1 (1969) (communications to domestic relations counselor are confidential); Utah Code Ann. § 40-8-8,13 (2002) (information disclosed to Board of Oil, Gas and Mining is confidential unless waived or mining operation terminates); Utah Code Ann. § 78-3e-2 (1986) (identity of person informing about illegal activity at schools is confidential); Utah Code Ann. § 76-7-313 (1981) (information on abortions is confidential); Utah Code Ann. § 34-38-13 (2004) (results of employer tests for drugs or alcohol are confidential subject to exceptions listed in the statute).

A fundamental maxim of statutory construction is "the expression of one should be interpreted as the exclusion of another." Carrier v. Salt Lake County, 2004 UT 98, ¶30, 104 P.3d 1208 (quotations and citation omitted). The fact that the Legislature provides exceptions to confidentiality in some statutes and not in others reinforces the conclusion that the Legislature did not intend an exception to the confidentiality requirement of section 78-14-12. The confidentiality of the prelitigation proceedings is neither Ms. Munson's nor the trial court's to waive. The only entity that has the power to alter or waive the absolute rule of confidentiality is the Legislature. Therefore, this Court should reject any notion that the concept of waiver applies to material prepared for the

prelitigation panel.[11] There is no testifying-expert exception to the confidentiality mandate in section 78-14-12(1)(d), and this Court should not create one.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SELECTED A MISTRIAL AS THE APPROPRIATE SANCTION FOR MS. MUNSON'S BREACH OF CONFIDENTIALITY.

Although Ms. Munson characterizes her opening brief as raising only questions of law, in fact Ms. Munson argues that Judge Davis also erred by failing to implement remedies other than ordering a mistrial. For example, Ms. Munson argues that Judge Davis should have permitted only "a limited examination of Dr. Jacobs in camera," or "cleared the courtroom" during Dr. Jacob's testimony, or allowed "that portion of the cross-examination to be conducted under seal," or ordered counsel for Dr. Chamberlain

[11] Ms. Munson cites a long string of cases and states that the cases represent situations in which a "court examined a discovery dispute and fashioned an order that expressly allowed the disclosure of confidential information to the opposing party's expert witness." (Aplt. Brief at 16.) Ms. Munson draws the conclusion from these cases that courts consistently permit expert witnesses to view confidential information. (Id.). Ms. Munson's interpretation of these cases, however, is overbroad. What these cases indicate is that courts consistently permit expert witnesses, within the confines of a protective order, to view the opposing party's confidential information. Court-ordered disclosure of confidential information to the opposing side during discovery is not analogous to the situation here. In this case, Munson disclosed confidential information from a sealed legal proceeding to her own testifying witness. And unlike a protective order, which protects or prevents the disclosure of sensitive information that could otherwise be relevant to the case, see Utah R. Civ. Proc. 26(c), under section 78-14-12(1)(d), the prelitigation proceedings are "confidential, privileged, and immune from the civil process." Id. The legislatively imposed confidentiality in the Act simply is unlike the ordinary confidentiality required when a party wants to protect a trade secret, for example. In the end, Munson's argument boils down to a plea for some type of a protective order as a remedy for her breach of the confidentiality of the prelitigation proceedings, something ancillary to whether Ms. Munson breached confidentiality in the first place.

to cross-examine "Dr. Jacobs regarding the documents in question without ever discussing the prelitigation panel at all." (Aplt. Brief at 22-24.) Ms. Munson concludes that because these alternative remedies were available, the trial court erred by declaring a mistrial. (Id. at 24.) These arguments challenge the sanction selected by Judge Davis, not the legal issue of whether disclosure of the prelitigation documents to Dr. Jacobs breached confidentiality, and therefore are reviewed for abuse of discretion. See State v. Castle, 951 P.2d 1109, 1111 (Utah Ct. App. 1998).

The trial court did not abuse its discretion by declaring a mistrial instead of imposing the sanction Ms. Munson would have favored. The trial court specifically considered Ms. Munson's proposed remedies and rejected them because it found a mistrial to be the most equitable sanction and remedy. The trial court carefully considered three possible sanctions for Ms. Munson's failure to preserve the confidentiality of the prelitigation proceedings: (i) to order a mistrial, allowing Ms. Munson the opportunity to retain another expert; (ii) to allow Dr. Chamberlain to cross examine Dr. Jacobs as to the effect of the confidential prelitigation documents on Dr. Jacobs' ultimate opinion, which would have required Dr. Chamberlain's counsel to breach the confidentiality provision himself; or (iii) to disqualify Dr Jacobs and dismiss Ms. Munson's case because she lacked necessary expert testimony. The trial court decided that a mistrial was the "most equitable sanction." (R. at 259). Far from being an abuse of discretion that prejudiced Ms. Munson, the trial court's choice of sanction was, in fact, favorable to Ms. Munson because it preserved Ms. Munson's ability to pursue the cause of action. Ms. Munson merely had to retain a new expert, refrain from violating

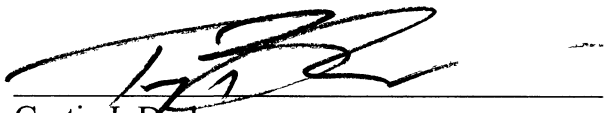
confidentiality again, and litigate the case. The trial court acted with utmost concern for Ms. Munson's interests and did not abuse its discretion by ordering the mistrial. The Court should affirm the trial court's decision to order a mistrial as a sanction for Ms. Munson's breach of confidentiality.

CONCLUSION

The trial court correctly ruled that Ms. Munson breached the confidentiality of the prelitigation proceedings when she provided her testifying expert with confidential documents from those proceedings. Furthermore, the trial court's selection of a mistrial as the appropriate sanction was not an abuse of discretion. Instead, the trial court's decision respected the sanctity of the prelitigation proceedings while preserving Ms. Munson's cause of action. The Court should affirm.

DATED this 25th day of September, 2006.

SNELL & WILMER L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2006, I caused a true and correct copy of the foregoing to be hand delivered to the following:

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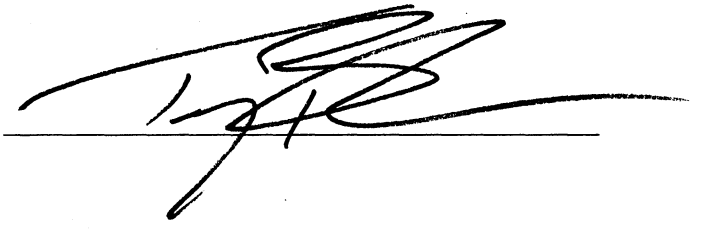

APPENDIX

1. Utah Code Annotated § 78-14-12
2. Doe v. Maret, 1999 UT 74, 984 P.2d 980
3. Notice of Appeal
4. Order Granting Summary Judgment
5. Bench Trial Exhibit 1, Letter from Counsel for Ms. Munson to Dr. Jacobs

Tab 1

U.C.A. 1953 § 78-14-12

C

WEST'S UTAH CODE ANNOTATED
TITLE 78. JUDICIAL CODE
PART II. ACTIONS, VENUE, LIMITATION OF ACTIONS
CHAPTER 14. UTAH HEALTH CARE MALPRACTICE ACT

→§ 78-14-12. Division to provide panel--Exemption--Procedures--Statute of limitations tolled--Composition of panel--Expenses--Division authorized to set license fees

(1)(a) The division shall provide a hearing panel in alleged medical liability cases against health care providers as defined in Section 78-14-3, except dentists.

(b)(i) The division shall establish procedures for prelitigation consideration of medical liability claims for damages arising out of the provision of or alleged failure to provide health care.

(ii) The division may establish rules necessary to administer the process and procedures related to prelitigation hearings and the conduct of prelitigation hearings in accordance with Sections 78-14-12 through 78-14-16.

(c) The proceedings are informal, nonbinding, and are not subject to Title 63, Chapter 46b, Administrative Procedures Act, but are compulsory as a condition precedent to commencing litigation.

(d) Proceedings conducted under authority of this section are confidential, privileged, and immune from civil process.

(2)(a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the service of a statutory notice of intent to commence action under Section 78-14-8.

(b) The request shall include a copy of the notice of intent to commence action. The request shall be mailed to all health care providers named in the notice and request.

(3)(a) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

(b)(i) The division shall complete a prelitigation hearing under this section within 180 days after the filing of the request for prelitigation panel review, or within any longer period as agreed upon in writing by all parties to the review.

(ii) If the prelitigation hearing has not been completed within the time limits established in Subsection (3)(b)(i), the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation.

(c)(i) The claimant and any respondent may agree by written stipulation that no useful purpose would be served by convening a prelitigation panel under this section.

(ii) When the stipulation is filed with the division, the division shall within ten days after receipt enter an order divesting itself of jurisdiction over the claim, as it concerns the stipulating respondent, and stating that the claimant has complied with all conditions precedent to the commencement of litigation regarding the claim.

(4) The division shall provide for and appoint an appropriate panel or panels to hear complaints of medical liability and damages, made by or on behalf of any patient who is an alleged victim of medical liability. The panels are composed of:

(a) one member who is a resident lawyer currently licensed and in good standing to practice law in this state and who shall serve as chairman of the panel, who is appointed by the division from among qualified individuals who have registered with the division indicating a willingness to serve as panel members, and a willingness to comply with the rules of professional conduct governing lawyers in the state of Utah, and who has completed division training regarding conduct of panel hearings;

(b)(i) one member who is a licensed health care provider listed under Section 78-14-3, who is practicing and knowledgeable in the same specialty as the proposed defendant, and who is appointed by the division in accordance with Subsection (5); or

(ii) in claims against only hospitals or their employees, one member who is an individual currently serving in a hospital administration position directly related to hospital operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim, and who is appointed by the division; and

(c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state, selected and appointed by the division from among individuals who have completed division training with respect to panel hearings.

(5)(a) Each person listed as a health care provider in Section 78-14-3 and practicing under a license issued by the state, is obligated as a condition of holding that license to participate as a member of a medical liability prelitigation panel at reasonable times, places, and intervals, upon issuance, with advance notice given in a reasonable time frame, by the division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

U.C.A. 1953 § 78-14-12

(b) A licensee may be excused from appearance and participation as a panel member upon the division finding participation by the licensee will create an unreasonable burden or hardship upon the licensee.

(c) A licensee whom the division finds failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed $5,000.

(d) A licensee whom the division finds intentionally or repeatedly failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed $5,000, and is guilty of unprofessional conduct.

(e) All fines collected under Subsections (5)(c) and (d) shall be deposited in the Physicians Education Fund created in Section 58-67a-1.

(6) Each person selected as a panel member shall certify, under oath, that he has no bias or conflict of interest with respect to any matter under consideration.

(7) Members of the prelitigation hearing panels shall receive per diem compensation and travel expenses for attending panel hearings as established by rules of the division.

(8)(a) In addition to the actual cost of administering the licensure of health care providers, the division may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.

(b) The claimant bears none of the costs of administering the prelitigation panel except under Section 78-14-16.

Current through end of 2006 Third Special Session

END OF DOCUMENT

Tab 2

C

Supreme Court of Utah.
Jane DOE, Plaintiff and Appellant,
v.
Leigh A. MARET, John Helfer, and Psychiatric Associates, Inc., Defendants and Appellees.
No. 970254.

Aug. 13, 1999.

Patient brought medical malpractice suit, alleging that release of her psychological records to ex-husband's attorney in prior divorce action caused her to relinquish custody of children. Defendant moved to compel testimony of attorneys who represented patient in divorce. The Third District Court, Salt Lake Department, David S. Young, J., granted motion. Patient appealed. The Supreme Court, Durham, Associate C.J., held that: (1) patient's filing of medical malpractice suit did not waive attorney-client privilege with respect to communications made during divorce action; (2) by volunteering information at deposition concerning specific attorney-client communications of a substantial nature, client waived attorney-client privilege with respect to those specific communications; and (3) notice of intent to commence medical malpractice action is part of the proceeding and must be kept confidential.

Affirmed as modified.

West Headnotes

[1] Appeal and Error 30 ⚿856(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k856 Grounds for Sustaining Decision Not Considered
30k856(1) k. In General. Most Cited Cases
Supreme Court will uphold a district court's ruling of law on any ground made available to the court below, whether expressly relied upon or not.

[2] Appeal and Error 30 ⚿842(2)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(2) k. Findings of Fact and Conclusions of Law. Most Cited Cases
Supreme Court reviews the district court's conclusions of law for correctness.

[3] Witnesses 410 ⚿198(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k197 Communications to or Advice by Attorney or Counsel
410k198 In General
410k198(1) k. In General. Most Cited Cases
Attorney-client privilege is intended to encourage candor between attorney and client and promote the best possible representation of the client. U.C.A.1953, 78-24-8(2); Rules of Evid., Rule 504.

[4] Witnesses 410 ⚿219(3)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k219 Waiver of Privilege

410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases
A party may waive the attorney-client privilege by placing attorney-client communications at the heart of a case, as where a party raises the defense of good faith reliance on advice of counsel. U.C.A.1953, 78-24-8(2); Rules of Evid., Rule 504.

[5] Witnesses 410 ⚿219(3)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k219 Waiver of Privilege
410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases
Client did not waive attorney-client privilege with respect to communications made during divorce proceeding by filing subsequent medical malpractice suit in which she alleged that improper release of her psychological records to ex-husband's attorney in divorce action caused her to relinquish custody of children; while client's attorney in divorce action may have learned information from client bearing on her reason for relinquishing custody, those communications were not at the heart of malpractice claim. U.C.A.1953, 78-24-8(2); Rules of Evid., Rule 504.

[6] Witnesses 410 ⚿198(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k197 Communications to or Advice by Attorney or Counsel
410k198 In General
410k198(1) k. In General. Most Cited Cases
Fact that a lawyer may have credible and important information gained through communication with a client does not itself justify the setting aside of the attorney-client privilege, even when the lawyer is the only non-party who may have that information. U.C.A.1953, 78-24-8(2); Rules of Evid., Rule 504.

[7] Pretrial Procedure 307A ⚿183.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)4 Scope of Examination
307Ak183 Privileged Matters
307Ak183.1 k. In General. Most Cited Cases
A continuing objection cannot effectively protect privileged communications that depend upon confidentiality for their privileged status if a deponent voluntarily discloses that information.

[8] Pretrial Procedure 307A ⚿183.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)4 Scope of Examination
307Ak183 Privileged Matters
307Ak183.1 k. In General. Most Cited Cases
A question at a deposition calling for privileged information cannot be answered subject to a later judicial ruling on the propriety of the question.

[9] Witnesses 410 ⚿219(3)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k219 Waiver of Privilege
410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases
When a client chooses to answer a question calling for privileged material by disclosing privileged communications with attorney, client waives attorney-client privilege at least as to the disclosed communications.

[10] Witnesses 410 ⚿219(3)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k219 Waiver of Privilege
410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases

Deponent's responses to questions calling for disclosure of insubstantial communications protected by attorney-client privilege did not waive the privilege as to substantial matters. U.C.A.1953, 78-24-8(2); Rules of Evid., Rules 504, 507.

[11] Trial 388 ⚿76

388 Trial
388IV Reception of Evidence
388IV(C) Objections, Motions to Strike Out, and Exceptions
388k76 k. Time for Objection. Most Cited Cases
An objection on cross-examination can only be made to a question; an attorney cannot effectively object to his client's answer once it has been given.

[12] Witnesses 410 ⚿219(3)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k219 Waiver of Privilege
410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases
To establish a waiver of attorney-client privilege, it is not necessary to show that a client intended to waive the privilege, but only that she intended to make the disclosure. Rules of Evid., Rule 507.

[13] Witnesses 410 ⚿219(3)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k219 Waiver of Privilege
410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases
Defendant who was sued for medical malpractice, based on allegation that release of patient's psychological records to attorney representing patient's husband in prior divorce action caused patient to relinquish custody of her children, was entitled to depose patient's divorce attorney concerning only those conversations between patient and attorney bearing on custody issue about which patient, in earlier deposition in malpractice action, made voluntary disclosures; patient by her testimony waived attorney-client privilege with respect to those conversations. U.C.A.1953, 78-24-8(2); Rules of Evid., Rules 504, 507.

[14] Health 198H ⚿806

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk806 k. Malpractice Panels in General. Most Cited Cases
(Formerly 299k17.5 Physicians and Surgeons)
Because the notice of intent to commence a medical malpractice action serves as the basis for the prelitigation panel review, and because it is often utilized as part of the prelitigation review, it is part of the proceeding and must be kept confidential. U.C.A.1953, 78-14-1, 78-14-12(1)(d).

***982** Michael L. Schwab,Lloyd A. Hardcastle, Farmington, for plaintiff.
David G. Williams, Terrence L. Rooney, Salt Lake City, for defendants.
DURHAM, Associate Chief Justice:
¶ 1 This case comes to us on interlocutory appeal. The district court granted appellee Leigh A. Maret's motion to compel the deposition testimony of appellant Jane Doe's counsel from a prior case involving a divorce and custody dispute ("prior counsel"). The sole issue for review is whether appellant waived the attorney-client privilege with regard to communications with her prior counsel. We affirm but modify the district court's ruling.

BACKGROUND

¶ 2 In this medical malpractice case, Doe claimed that defendants wrongfully provided her psychological records to her ex-husband's attorney in the divorce and custody proceeding. The psychological records were highly personal and confidential. Ultimately, Doe voluntarily gave up custody of her children and claims in this case that she decided to relinquish custody of her children

because her ex-husband threatened to tell the children about the information contained in the records. Appellee Maret is the only defendant remaining in the suit.

¶ 3 In the court below, Maret filed a motion to compel the testimony of the attorneys who assisted plaintiff in the custody dispute. Maret argued that the Doe had waived the attorney-client privilege protecting communications with her prior counsel by placing her motivation for relinquishing custody at issue in this case. Maret also argued that Doe waived the privilege by providing voluntary deposition testimony concerning her communications with prior counsel.

¶ 4 The district court granted Maret's motion to compel, citing Rule 504 of the Utah Rules of Evidence as authority. However, the district court failed to identify the specific provision of Rule 504 justifying its finding of waiver. At one point in the hearing, the district judge offered some insight into his reasoning by stating:
And I don't understand how it can be now that she hasn't waived the privilege by filing this, by the nature of this lawsuit. For instance, if the lawyer were to testify that she didn't relinquish custody on the basis of this released information, that she did it on whatever other basis, then that would be very credible and important information.

[1] ¶ 5 Maret correctly notes that this court will uphold a district court's ruling of law on any ground made available to the court below, whether expressly relied upon or not. *See Higgins v. Salt Lake County,* 855 P.2d 231, 235 (Utah 1993). In reliance upon this principle, Maret argues that the district court's ruling can also be upheld on the ground that Doe waived the privilege in her deposition testimony under Rule 507 of the Utah Rules of Evidence.

[2] ¶ 6 We review the district court's conclusions of law for correctness. *See Jacobsen Inv. Co. v. State Tax Comm'n,* 839 P.2d 789, 790 (Utah 1992).

ANALYSIS

[3] ¶ 7 The attorney-client privilege "is intended to encourage candor between attorney and client and promote the best possible representation of the client." *Gold Standard, Inc. v. American Barrick Resources (USA), Inc.,* 801 P.2d 909, 911 (Utah 1990). It is the oldest of the common law privileges protecting confidential communications. *See Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (citing Wigmore, *Evidence in Trials at Common Law* § 2290, Utah Code Ann. at 542 (McNaughten 1961)). The privilege is recognized in Rule 504 of the Utah Rules of Evidence [FN1] as well as by statute at ***983**§ 78-24-8(2) (1996). [FN2] Although the legislature and courts have carefully guarded the integrity of the privilege, we have long held that it can be waived by a client. *See In re Young's Estate,* 33 Utah 382, 385, 94 P. 731, 732 (Utah 1908).

FN1. Rule 504 reads as follows:
(a) Definitions. As used in this rule:
(1) A "client" is a person, including a public officer, or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.
(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
(3) A "representative of the lawyer" is one employed to assist the lawyer in a rendition of professional legal services.
(4) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.
(5) A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the

professional relationship.
(6) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.
(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.
(d) Exceptions. No privilege exists under this rule:
(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or
(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or
(4) Document attested by lawyer. As to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness; or
(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

FN2. Section 78-24-8(2) of the Code provides:
An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in his capacity as an employee.

¶ 8 We first consider whether Doe waived the attorney-client privilege under Rule 504. In accordance with long-standing principles of common law, Rule 504 affords a client a privilege protecting confidential attorney-client communications subject to five exceptions. Specifically, the rule does not recognize a privilege when (1) the legal services were sought in furtherance of a crime or fraud, (2) the client has died and the lawyer-client communications are relevant to an issue between parties making claims through the deceased client, (3) the lawyer and client are themselves in dispute regarding an issue of breach of duty, (4) the communication is relevant to a document to which the lawyer was an attesting witness, or (5) a dispute arises between joint clients of the lawyer. None of these exceptions apply here.

[4][5] ¶ 9 A party may also waive the privilege by

placing attorney-client communications at the heart of a case, as where a party raises the defense of good faith reliance on advice of counsel. *See, e.g., Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156, 1162-63 (9th Cir.1992) (holding that party's claim that tax position was reasonable because based on advise of counsel, waived the privilege); *Conkling v. Turner,* 883 F.2d 431, 434-35 (5th Cir.1989) (holding that when plaintiff alleged ***984** that fraud claim was not time-barred because he was unaware of fraud until informed of it by his attorneys, plaintiff waived privilege under federal rules); *Multiform Dessicants, Inc. v. Stanhope Prods., Co., Inc.,* 930 F.Supp. 45, 48-49 (W.D.N.Y.1996) (holding that where attorney in patent infringement was to testify as expert witness, plaintiff waived privilege as to communications pertaining to patent prosecution); *United States v. Bernard,* 877 F.2d 1463, 1465 (10th Cir.1989) (holding banker waived privilege when he told victim he had checked legality of proposed loan with attorney). Such is not the case here. Whether Doe chose to relinquish custody of her children in order to avoid further dissemination of the contents of her psychological records is a core issue in this case; whether she discussed this with her attorney is not.

[6] ¶ 10 Contrary to the district court's apparent reasoning, the fact that a lawyer may have credible and important information gained through communication with a client does not itself justify the setting aside of the privilege (even when the lawyer is the only non-party who may have that information). In many cases a lawyer may have information gained through client communications that would be of great utility to an opposing party in the same or later litigation. Allowing an opposing party to depose that attorney in such cases merely because that evidence would be important and credible would eviscerate the privilege. The same rationale could be used to justify deposing a cleric in whom Doe had confided simply because the cleric might have relevant information about Doe's motivations. Such a practice would not advance the purposes of the privilege as it would not " ' encourage clients to make full disclosure to their attorneys.' " *Gold Standard,* 801 P.2d at 911 (quoting *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)). Accordingly, we hold that Doe did not waive the attorney-client privilege under Rule 504 merely by bringing a suit where her decision to relinquish custody is at issue.

¶ 11 Maret also argues that Doe's communications with her prior counsel cannot be considered " confidential" under Rule 504 because she has discussed the details of those conversations in her deposition. However, Rule 504 does not address the issue of waiver. Rule 504 is only concerned with defining whether a communication is privileged at the time it is made. There is no dispute that Doe's communications with her prior counsel were intended to be confidential at the time they were made. Whether Doe subsequently waived the privilege is a question properly considered under Utah Rule of Evidence 507.

¶ 12 Rule 507(a) provides:
A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure.

Utah R. Evid. 507(a). Maret argues that during Doe's deposition she disclosed information regarding her communications with prior counsel and thereby waived the privilege under Rule 507. In opposition, Doe argues that the testimony at issue took place after Doe's counsel had made a " continuing objection" to all questions regarding attorney-client communications and that this objection prevented any subsequent waiver. Because the nature and context of this objection is important, we quote the discussion of it in its entirety:PLAINTIFF'S COUNSEL: Back on the record. I have explained my understanding of the attorney/client privilege to my client, also I explained my understanding of the potential of waiving that. There are certainly some things she doesn't mind if you know but as with any attorney/client privilege that there are certainly things that she would rather be kept between her and her attorney. *For that reason she has decided*

to assert the attorney/client privilege as to all conversations between her and her counsel.
CO-DEFENDANT'S COUNSEL: We could do it a couple of ways. I think that by bringing this lawsuit and alleging what she alleges as damages she has waived the privilege for her attorneys in her divorce ***985** action because she is alleging she made decisions, she was damaged by the records coming out, and so I think it is clearly relevant, and I can ask some questions. *You can assert the privilege or not assert the privilege as you choose, but what I am understanding you to say is if I ask any questions about communications she had with attorneys who helped her in her divorce action you will assert attorney/client privilege; it that correct?*
PLAINTIFF'S COUNSEL: That is correct. Although we respect your opinion, we disagree with it. I believe any conversations with an attorney, whether it be in the current litigation or previous litigation, is still protected by the attorney/client privilege. If I am wrong, then I guess we will let the judge tell me I am wrong but *as for this deposition, we are asserting that privilege and she will not be talking about those conversations.*
CO-DEFENDANT'S COUNSEL: Well, for purposes of creating a record to make it clear for the Court what kind of questions I would be asking, *I will ask the questions and I assume you will object to them ....*
PLAINTIFF'S COUNSEL: That's fine. Maybe to save some time, rather than having me object after each question, *I will just state that in order not to waive the attorney/ client privilege we don't feel that we can talk about any conversations between [appellant] and her attorney, especially involving the divorce litigation that you are talking about.*
So rather than objecting after each question, you might want to read a list of the questions that you would ask.
CO-DEFENDANT'S COUNSEL: Okay.

(Emphasis added.) Although the record is not complete, it appears that co-defendant's counsel did not in fact limit himself to a preliminary reading of the list of questions he wanted to have answered. Rather, at several points in the deposition he asked Doe questions specifically calling for reference to privileged material. Counsel for Doe did not object to some of those questions, and Doe answered them.

[7][8][9] ¶ 13 This court has not had occasion to consider the effect of so-called continuing objections in this context. There are undoubtedly many circumstances in depositions where continuing objections may be effective and desirable as a way to protect rights, preserve arguments, and facilitate the deposition process. However, a continuing objection cannot effectively protect privileged communications that depend upon confidentiality for their privileged status if a deponent voluntarily discloses that information. For this reason, when an attorney objects to a question on the ground that it seeks material protected by the attorney-client privilege, the attorney typically also instructs the client not to answer. For the same reason, "at a deposition a question calling for privileged information cannot be answered subject to a later judicial ruling on the propriety of the question." 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5507 (1986) (footnote omitted). When a client chooses to answer a question calling for privileged material by disclosing privileged communications, she waives the privilege at least as to the disclosed communications.

¶ 14 This principle appears to have been understood by Doe's counsel. After he made the continuing objection, he allowed several questions to be asked regarding attorney-client communications even though he had asserted earlier that "we don't feel that we can talk about any conversations between [appellant] and her attorney."
None of the questions he allowed her to answer concerned substantive issues, however. In contrast, when opposing counsel asked substantive questions regarding privileged communications, Doe's counsel objected (despite the earlier discussion) and his client refused to answer:
Q: Did [appellant's former counsel] discuss with you that because of your protective order complaint that there might be an argument that you had waived or given up the privilege to hold those documents as being private?
A: No.
APPELLANT'S COUNSEL: Hold on just a second, I think in my mind you have ***986** crossed

the line. I have been trying to be as lax as I could for the sake of moving this case forward letting you talk about what she and her attorney discussed as far as procedural matters. I believe the question crosses the line and gets into the merits of what they were discussing regarding the case and strategy. I believe that crosses the line. In addition to attorney-client privilege, I don't think that is an appropriate question.
Q: Are you going to follow your counsel's advice on that point.
A: Yes.

¶ 15 Implicit in the objection of Doe's counsel is his determination that the questions asked previously had not sought "a significant part" of the privileged communications and thus answering them could not constitute waiver under Rule 507. When opposing counsel asked a question that called for disclosure of matters that were arguably of significance, Doe's counsel properly objected and his client invoked the privilege.

[10] ¶ 16 We agree with Doe that her responses to questions calling for disclosure of insubstantial communications protected by the attorney-client privilege did not waive the privilege as to substantial matters. We reach this conclusion not because the continuing objection based on the attorney-client privilege protected Doe from waiving it when she disclosed privileged material (it did not), but rather because her answers to the questions calling for privileged material did not reveal a significant part of the privileged communications as contemplated by Rule 507.

¶ 17 However, at two points in her deposition, Doe disclosed the contents of significant privileged communications in response to questions that did *not* call for the disclosure of privileged communications. In other words, she volunteered the information.[FN3]

> FN3. The content of these disclosures was as follows:
> Q: And in your lawsuit, in your divorce lawsuit at that time and, in fact, throughout the time period from the time you answered the complaint through the end of September, you were seeking to keep your kids and keep them in your marital home, weren't you?
> A: Yes, I was.
> Q: For you to have possession of the home and be able to live there with your kids. Right?
> A: But I was also afraid of the fact that my husband was going to tell my children and I thought about that since the day that it happened, and *I discussed it with my attorney and she told me if I ever gave up custody of my children there would probably be no way to get them back.*
> Q: How did that agreement to resolve your divorce action come about?
> A: I just *told my attorney that I couldn't handle the fact that I may possibly lose my kids every day that I went to court, that I was tired of all the court proceedings that we had been to, that I knew my husband would never stop, and that if I did get custody of the children that he would tell the kids what had happened to me.*
> (Emphasis added.)

[11] ¶ 18 Doe argues that because these answers were "non-responsive," counsel could not have objected to the question and therefore the answer cannot be viewed as a waiver of the privilege. Doe is half-right. An objection can only be made to an attorney's question; an attorney cannot effectively object to his client's answer once it has been given. However, this fact has no bearing on whether there has been a waiver. In Utah, the question of whether the disclosure constituted a waiver turns on whether the disclosure was voluntary or excusably inadvertent. *See* Utah R. Evid. 507 (a privilege holder waives the privilege by voluntarily disclosing significant matter or by failing to take reasonable steps to prevent inadvertent disclosure); *see generally* John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure-State Law,* 51 A.L.R. 5th 603, 634 (1997).

[12] ¶ 19 It is difficult to view this case as one of

inadvertent disclosure as contemplated by Rule 507. Such inadvertence is typically found in the context of document disclosure. *See* Waiver of Evidentiary Privilege by Inadvertent Disclosure, 51 A.L.R. 5th at 635. The notion of inadvertence is not applicable in the context of a deposition where, as here, counsel has carefully explained the legal consequences of disclosure to his client but the client nonetheless chooses to volunteer details concerning privileged communications. Rule 507 recognizes waiver when a privilege holder " voluntarily discloses"***987** privileged material; it does not ask whether the disclosure was made with specific intent to waive the privilege. Thus, it is not necessary under Rule 507 to show that a client intended to waive the privilege but only that she intended to make the disclosure. *See Tennenbaum v. Deloitte & Touche,* 77 F.3d 337, 341 (9th Cir.1996) ("the focal point of privilege waiver analysis should be the holder's disclosure ... not the holder's intent to waive the privilege"); *United States v. Ryans,* 903 F.2d 731, 741 n. 13 (10th Cir.1990) (holding that voluntary disclosure is sufficient to waive the privilege); *Goldsborough v. Eagle Crest Partners Ltd.,* 314 Or. 336, 838 P.2d 1069, 1073 (1992) (holding that once confidentiality is destroyed by disclosure, privilege is waived); *Freeman v. Bianchi,* 820 S.W.2d 853, 861 (Tex.App.1991) ("we do not interpret the term ' voluntary' to encompass only disclosures that are made intentionally and knowingly."). This reasoning is all the more persuasive in circumstances, such as those here, where a party selectively discloses some privileged information to gain an advantage in litigation. *Cf. State v. Hoben,* 36 Utah 186, 198, 102 P. 1000, 1004 (1909) (holding that when a client testifies as to some privileged communications with his attorney, he may not be heard to complain when his attorney is called to impeach him).

[13] ¶ 20 We conclude that by volunteering information concerning specific attorney-client communications of a substantial nature during the course of deposition testimony, Doe has waived the privilege. However, we hold Doe's waiver to be limited to the particular subject matter *and* the conversation disclosed by Doe in her deposition testimony referred to in footnote three of this opinion. Accordingly, we modify the district court's ruling as follows: Maret is entitled to depose the attorney with whom, according to Doe's voluntary disclosure, she communicated. The deposition questions should be limited to the communications concerning the disclosed subject matter as quoted in footnote three.

[14] ¶ 21 We turn now to an unrelated issue. Maret, in his brief before this court, made reference to and quoted from Doe's "Notice of Intent to Commence Malpractice Action." In addition, Maret attached a copy of the notice as an addendum. Section 78-14-1 of the Utah Code mandates that medical malpractice actions be initiated with the filing of a notice of intent. Section 78-14-12(1)(d) provides that the " proceedings conducted under authority of this section are confidential, privileged, and immune from civil process." Utah Code Ann. § 78-14-12(1)(d) (1996). Whether the notice of intent is part of the prelitigation "proceeding" has never been determined by this court. Today we hold that because the notice of intent serves as the basis for the prelitigation panel review, and because it is often utilized as part of the prelitigation review, it is part of the proceeding and must be kept confidential. Although we decline to impose sanctions for Maret's disclosure, particularly in view of the heretofore unsettled status of the notice, failure to keep prelitigation proceedings confidential may in the future result in sanctions.

¶ 22 Chief Justice HOWE, Justice STEWART, Justice ZIMMERMAN, and Justice RUSSON concur in Associate Chief Justice DURHAM's opinion.

Utah,1999.
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END OF DOCUMENT

Tab 3

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

REBEKAH MUNSON, Plaintiff, **vs.** BRUCE H. CHAMBERLAIN, M.D. and CENTRAL UTAH MEDICAL CLINIC, Defendants.	**NOTICE OF APPEAL** Case No.050100024 Judge Derek P. Pullan

Plaintiff, by and through counsel of record, hereby appeals from the Order Granting Defendant's Motion to Reconsider the Order of Mistrial entered by the above-entitled Court on April 24, 2006.

DATED this 8th day of May, 2006.

KENNETH PARKINSON, and
RYAN D. TENNEY for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILLING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 5 day of May, 2006.

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SECRETARY

I \Munson Rebekah Med Mal 25500-1\notice of appeal wpd

Tab 4

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Attorneys for Defendants
Bruce H. Chamberlain, M.D. and
Central Utah Medical Clinic

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, AMERICAN FORK DEPARTMENT, STATE OF UTAH

REBEKAH MUNSON,

Plaintiff,

vs.

BRUCE H. CHAMBERLAIN, M.D. and CENTRAL UTAH MEDICAL CLINIC,

Defendants.

ORDER

Case No. 050100024

Judge Derek P. Pullan

Plaintiff's Motion to Reconsider the Order of Mistrial ("Motion to Reconsider") and Defendants' Motion for Summary Judgment were heard by the Honorable Derek P. Pullan, Fourth District Judge, on March 29, 2006 at 2:30 p.m. Plaintiff was represented by Kenneth Parkinson. Defendants were represented by Curtis J. Drake. The Court had reviewed the pleadings which were filed by the parties. The Court noted the parties' respective positions with

respect to the order in which the two motions should be heard and chose to first hear oral argument on Plaintiff's Motion to Reconsider.

Motion to Reconsider

Generally speaking, Plaintiff argues that manifest injustice will result if this Court does not reconsider Judge Lynn W. Davis's Order of Mistrial of March 26, 2004 ("Order of Mistrial"). Plaintiff contends that Doe v. Maret, 984 P.2d 980 (Utah 1999) is limited to its facts and does not prohibit counsel from providing a testifying expert witness with confidential documents in this instance. Plaintiff contends that classifying as confidential the subject notice of intent to commence action and the report of her consulting expert, Dr. Greg Kane ("Notice of Intent" and "Dr. Kane's Report", respectively) would produce an absurd result that was not intended by the Utah state legislature ("Legislature") in enacting Utah Code Ann. §78-14-12(1)(d) (2002). Finally, Plaintiff argues that the confidentiality of the Notice of Intent and of Dr. Kane's Report can be waived.

Defendants contend that there is insufficient cause to reconsider the Order of Mistrial. Defendants assert that Doe v. Maret, supra, is controlling. Defendants further argue that the confidentiality of the Notice of Intent and of Dr. Kane's Report cannot be waived. Finally, Defendants assert that they were prejudiced at trial by the inability to cross-examine Dr. Alexander Jacobs with respect to both the Notice of Intent and Dr. Kane's Report.

The Court finds that the Legislature intended to extend confidentiality to all materials which are used in a prelitigation panel hearing. Doe v. Maret supports this interpretation. The Legislature has not made any exceptions to this provision, and it would be inappropriate for this

Court to carve out a judicial exception. The Court also finds that the confidentiality status which attached to the Notice of Intent and to Dr. Kane's report cannot be waived. The Court finds that Defendants were prejudiced by the inability to cross-examine Plaintiff's expert witness with respect to the content of the Notice of Intent and Dr. Kane's report. Finally, the Court finds that the decision by Judge Davis, as reflected in the Order of Mistrial, was well reasoned; this Court adopts the Order of Mistrial as consistent with its ruling.

Based upon the foregoing, the Motion to Reconsider is DENIED.

Motion for Summary Judgment

After hearing argument and after ruling on the Motion to Reconsider, the Court inquired of counsel for Plaintiff whether it was conceded that the denial of the Motion to Reconsider would be dispositive of the Motion for Summary Judgment. Counsel responded by affirming that Dr. Alexander Jacobs is Plaintiff's only expert witness. Counsel for Plaintiff offered no further argument.

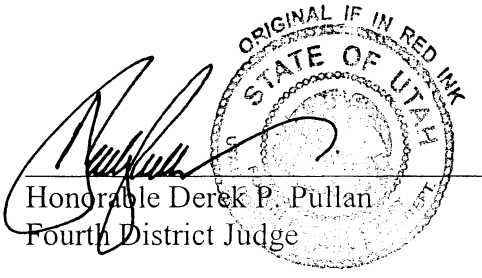
The Court then inquired of counsel for Defendants whether argument on the Motion for Summary Judgment was desired. Counsel responded by submitting the Motion for decision based up on the memoranda on file.

The Court finds that, based upon its denial of the Motion to Reconsider, Dr. Alexander Jacobs, Plaintiff's only expert witness, is not qualified to render opinions regarding the standard of care for Defendants. Therefore, Plaintiff has failed to establish a prima facie case of negligence against Defendants. Therefore, Defendants are entitled to summary judgment as a matter of law.

Based upon the foregoing, the Motion for Summary Judgment is GRANTED.

DATED this 24 day of APRIL, 2006.

BY THE COURT:



Honorable Derek P. Pullan
Fourth District Judge

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HOWARD, LEWIS & PETERSEN, P.C.

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December 31, 2001

Alexander Jacobs, M.D.
3300 East 17th Avenue
Denver, Colorado 80206

RE: Rebekah Munson v. Bruce H. Chamberlain, M.D. & Central Utah Medical Clinic

Dear Dr. Jacobs:

We were referred to you by Dr. Greg Kane to review the above case for us. I am enclosing the following documents for your review:

1. Copy of draft of Notice of Intent to Commence Action - outlines the facts and liability issues of the case.

2. Copy of Dr. Richard Call's medical records - Ms. Munson first saw Dr. Call for her complaints of pain.

3. Copy of Dr. Bruce Chamberlain's and Central Utah Medical Clinic's records - Diagnosis of polymyositis and treatment.

4. Copy of Dr. Richard Gremillion's records - correct diagnosis and treatment following treatment of Dr. Chamberlain.

5. Copy of Dr. Richard Rosenthal's records - chronic pain treatment.

6. Copy of Dr. Joseph Watkins' records - EMG Studies

7. Copy of Dr. Doug Jones' records - Family physician

8. Copy of Utah Valley Regional Medical Center emergency room records for 12/18/98 - diagnosis of myositis

Also enclosed is a check in the amount of $500.00 for an initial retainer as well as a copy of the initial review by Dr. Greg Kane. If you need any additional medical records or information, please let me know. Once you have had a chance to review the enclosed materials, please contact my paralegal, Heather Finch to arrange a phone appointment.

Respectfully,

HOWARD, LEWIS & PETERSEN

Kenneth Parkinson

KP\hf
Enclosures

J:\KBP\JACOBS.LTR